

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
NOVEMBER 15, 2006 Session

**SONS OF CONFEDERATE VETERANS, INC. and MARK L. (BEAU)  
CANTRELL, ET AL. v. DENNE A. SWEENEY, ET AL.**

**Direct Appeal from the Chancery Court for Maury County  
No. 05-092 Robert L. Jones, Chancellor**

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**No. M2006-00116-COA-R3-CV - Filed on April 16, 2007**

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This appeal involves a corporate governance dispute. The plaintiffs, who are members of a Mississippi nonprofit corporation of which the defendant is also a member, held a special meeting in February of 2005 at which they voted to remove the defendant from his position as the highest ranking member of the corporation, in response to the defendant's actions at a meeting held in December of 2004. The plaintiffs filed a complaint in a Tennessee court seeking a temporary restraining order and injunctive relief prohibiting the defendant from acting in his former capacity, and attorneys' fees. The court granted a temporary restraining order against the defendant. The defendant filed a motion to dissolve the temporary restraining order, and to dismiss based upon the plaintiffs' failure to provide a copy of the complaint to, or obtain approval by, the corporation's governing body prior to suit, as set forth in the corporation's bylaws. Later, after a hearing on motions by both parties, the trial court dissolved the restraining order, found that none of the actions of the respective parties at the December or February meeting had any binding effect, and denied the defendant's motion to dismiss. The plaintiffs moved for attorneys' fees under the relevant Mississippi derivative action statute. After a hearing, the trial court found that, because of defects in their initial complaint, the plaintiffs were not properly before the court, but it allowed the plaintiffs to file a motion to intervene and an amended complaint. The trial court held another hearing and entered an order in which it allowed the plaintiffs to intervene and awarded them attorneys' fees under the Mississippi statute. The defendant filed a timely notice of appeal. We affirm the judgment of the trial court.

**Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Affirmed**

ALAN E. HIGHERS, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and HOLLY M. KIRBY, J., joined.

Thor Y. Urness, Melissa Ballengee Alexander, Nashville, TN, for Plaintiff/Appellant, Sons of Confederate Veterans, Inc.

Thomas W. Hardin, Patrick M. Carter, Columbia, TN, for Intervening Plaintiffs/Appellees, Mark L. (Beau) Cantrell, et al

**Tenn. R. App. P. 3; Appeal as of Right; Affirmed.**

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Thor Y. Urness and Melissa Ballengee Alexander, of Nashville, Tennessee, for Appellants.

Thomas W. Hardin and Patrick M. Carter, of Columbia, Tennessee, for Appellees.

**OPINION**

**I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

This appeal involves an award of attorneys' fees arising from a bitter corporate governance dispute. The plaintiffs and the appealing defendant are members of Sons of Confederate Veterans, Inc., ("SCV") a nonprofit Mississippi corporation with its principal place of business in Maury County, Tennessee. Denne A. Sweeney ("Sweeney" or "Appellant") was elected to the highest position in the corporation, Commander-in-Chief, in the summer of 2004. At a General Executive Council ("GEC") meeting held on approximately December 19, 2004, Sweeney initiated several corporate governance actions that were unpopular with certain other members of the GEC.<sup>1</sup>

On February 16, 2005, a group of dissenting members of the GEC called a special telephonic meeting by which they voted to remove Sweeney from his position as Commander-in-Chief of SCV. On February 17, 2005, these certain members, specifically, Mark L. Cantrell, Dr. Norman Dasinger, William E. Faggert, John L. French, Ralph Green, Robert L. Hawkins, III, C. Anthony Hogges, D.D.S., and Charles H. Smith, ("Appellees") filed a complaint in the Chancery Court for Maury County, Tennessee, at Columbia, for injunctive relief in the name of SCV against Sweeney, seeking to prohibit any further actions by him as Commander-in-Chief. Appellees alleged that the February 16, 2005 meeting of the GEC at which they had voted to remove Sweeney from his position had been in response to Sweeney's "illegally and unconstitutionally attempting to disenfranchise two designated directors without regard to the process required to do so by the SCV constitution or Mississippi statute" at a GEC meeting held on December 19, 2004, "the appointment of Luther William Norrad . . . as Department Councilman of the Army of the Trans-Mississippi Department of the SCV[,] as well as other actions "allegedly taken by the SCV" at the December meeting. A hearing was held that day, and the court entered a temporary restraining order on February 18, 2005, and stated that it would set a date for hearing on Appellees' request for a permanent injunction. Upon Appellees' motion, the trial court later extended the temporary restraining order until a hearing to be held on March 9, 2005.

On March 7, 2005, Sweeney filed a motion to dissolve the temporary restraining order and to dismiss, pursuant to Rules 65.03 and 12.02 of the Tennessee Rules of Civil Procedure. In his

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<sup>1</sup> The parties have stipulated that the GEC is to be considered "the board of the SCV."

supporting memorandum of law, Sweeney argued for a dismissal pursuant to Tenn. R. Civ. P. 12.02 because the parties lacked “standing” to bring suit on the behalf of SCV based upon Article XVI, Section 7 of the SCV bylaws, which provides:

*ARTICLE XVI - Prohibitions*

...

Section 7. No legal action against or on behalf of the Sons of Confederate Veterans, its officers and/or members shall be undertaken or entered into by any member of the Sons of Confederate Veterans in which that member proposes to act as a representative or agent of the Sons of Confederate Veterans without prior approval of the General Executive Council. If a proposed legal action is presented to the General Executive Council for approval, the petition shall be distributed in writing to all members of the Council prior to the filing of the same. The petition shall state the name(s) and address(es) of the party (parties) against whom the petition is proposed to be filed. The affirmative vote of the members of the Council shall be necessary for Council approval of such legal action. If any legal action is filed without the approval of the Council, the member(s) filing such action shall be subject to expulsion from the Sons of Confederate Veterans in accordance with the provisions of this Constitution which relate to expulsion of members.

Sweeney’s motion to dissolve the temporary restraining order additionally asserted that Appellees had not satisfied the requirements for a restraining order as set forth in Tenn. R. Civ. P. 65.03. The trial court held a hearing on March 9, at which it heard approximately seven hours of argument by the parties and allowed exhibits to be admitted. Appellant Sweeney opted only to include the technical record on appeal, therefore the appellate record lacks any transcript from this, or any other, hearing held by the court below, and it is further unclear what exhibits were offered for the court’s consideration.

Sweeney’s motion to dismiss based upon Appellees’ failure to distribute copies of the complaint to the GEC and lack of prior approval of the suit by the GEC, which Sweeney argued were prerequisites to bringing derivative actions according to the SVC bylaws, was denied in its order entered March 23, 2005, *nunc pro tunc* to March 9, 2005 by the trial court, which stated its reasoning as follows:

The Court determines that defendant’s motion to dismiss based upon lack of standing and lack of GEC approval of the action should be and hereby is denied based upon the premise that the Court should be open and accessible to prospective litigants and because of ambiguities in the language of the bylaw provisions that the defendant relies upon.

Although Sweeney asserted this argument at various stages in this litigation, this brief statement in the March 23, 2005 order is the sole occasion reflected in the technical record in which the trial court addressed this specific issue.

In its order from March 23, the court additionally dissolved the temporary restraining order and denied Appellees' motion for a temporary injunction. In its lengthy findings of fact and conclusions of law, with regard to the meetings held on December 19, 2004, and February 16, 2005, the trial court found as follows:

7. The Court finds that the commander-in-chief of the SCV does not have authority under Mississippi law or the bylaws of the SCV to suspend in whole or in part the GEC membership of any person and that the December 19, 2004 suspensions of two past commanders-in-chief (Peter W. Orlebeke and Robert L. Hawkins, III) and the five other persons temporarily suspended (William E. Faggert, Lynn J. Shaw, Charles Smith, Norman Dasinger and Mark L. Cantrell) were all invalid.

...

9. The Court finds that as the commander-in-chief of the SCV on February 16, 2005, Mr. Sweeney had the right to chair any meeting held that evening if he had been in attendance.

...

13. With considerable concern for why the three calling the February 16 meeting did so, this Court cannot bless – especially by way of such extraordinary relief as a temporary injunction – the very restrictive way in which it was done. The Court understands that these three persons did not think they could accomplish anything any other way because they thought as a result of actions in December 2004 and otherwise that the chair might not recognize them for motion purposes in any other meeting, and that all of us as human beings have from time to time been tempted to think that the ends are so important that they justify the means, and the evidence suggests that Mr. Sweeney has on a number of occasions greatly exceeded the authority intended to be given him by state law and the bylaws at potential detriment to the organization, and that that might cause GEC members and persons who have devoted many years of their lives to the organization to pursue relief with some feelings of desperation, but a Court of equity cannot bless the result of such an error if it fails to give fair and reasonable notice with an opportunity to be heard and to knowingly participate in the decision making. Against this backdrop the Court finds that e-mail notice to the 22 people that had access to it was adequate but that too much restriction, too much

impingement upon the opportunity to appear, to be heard and to participate in the decision making invalidated the effort here. Again, particularly for temporary injunction reasons – that being extraordinary relief – the Court is not inclined to grant the temporary injunction and sets aside and quashes the temporary restraining order.

The trial court ultimately found that there had been no quorum for the December 19, 2004 meeting at which Sweeney had suspended several members of SCV, and it further found that there had not been sufficient notice prior to the February 16, 2005 meeting called by Appellees at which they had attempted to remove Sweeney as Commander-in-Chief. Accordingly, the court held that neither meeting had any binding effect and ordered that the officers installed in meetings held in July of 2004 continue to function.

On April 7, 2005, Sweeney filed an answer and counterclaim.<sup>2</sup> On June 14, 2005, Appellees filed a motion in the name of SCV for an award of interim attorneys' fees and expenses incurred pursuant to the Mississippi Nonprofit Corporation Act, and specifically the provisions under this act dealing with derivative actions involving nonprofit corporations. The statute relied upon provides in relevant part:

(3) A complaint in a proceeding brought in the right of a corporation must be verified and *allege with particularity the demand made, if any, to obtain action by the directors and either why the complainants could not obtain the action or why they did not make the demand.* If a demand for action was made and the corporation's investigation of the demand is in progress when the proceeding is filed, the court may stay the suit until the investigation is completed.

...

(5) *If the proceeding on behalf of the corporation results in the corporation taking some action requested by the complainants or otherwise was successful, in whole or in part, or if anything was received by the complainants as the result of a judgment, compromise or settlement of an action or claim, the court may award the complainants reasonable expenses (including counsel fees).*

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<sup>2</sup> In his counterclaim, Sweeney asked the trial court to "adjudicate and declare the rights of Sweeney and the other members of the GEC relating to the subject meetings" and for an award of attorneys' fees. The trial court's December 9 order characterized the counterclaim as "being in the nature of a declaratory and derivative action" and stated that "[u]nder Mississippi law and equity, Defendant Sweeney would be entitled, should he so choose, to avail himself of the benefits of the Mississippi derivative action statute to recover from the corporation for litigation expenses he incurred following the February 16, 2005, meeting." However, by this time, it appears from the technical record that Sweeney had abandoned his counterclaim, as evinced by the following statement in his August 10 motion in response to Appellees' motion for attorneys' fees: "Defendant Denne Sweeney, who would clearly be entitled to recover his attorneys' fees as a director who was sued as a result of his position, is not asking the SCV to pay for his legal expenses."

Miss. Code Ann. § 79-11-193 (2005). Sweeney filed a motion in response in which he argued that the initial complaint did not meet the pleading requirements set forth in the statute, because it did not allege what, if any, demand had been made prior to suit.

The trial court held a hearing on August 15, 2005, and entered an order on September 23, 2005, in which it found that Appellees' motion for attorneys' fees was "not properly before [the] Court as the real parties in interest and/or intervening Plaintiffs [were] not . . . before the Court." The order further provided that the trial court would entertain a motion by Appellees to intervene and to file an amended complaint. Appellees filed a motion to intervene and amend their complaint on October 20, 2005. They also filed an amended complaint, which contained a section entitled "Derivative Action" under which paragraph number 22 of the complaint went on to state: "The Intervening Plaintiffs did not make a formal demand for action to Defendants because of the futility of doing so."

A hearing was held on November 21, 2005, and on December 9, 2005, the trial court entered an order in which it allowed Appellees to intervene and amend their complaint, ruled that the action had effectively begun as and continued to be a derivative action, and awarded Appellees attorneys' fees in the amount of \$38,020.80 pursuant to Miss. Code Ann. § 79-11-193. The trial court also ruled that its "findings of fact and conclusions of law encompassed in the order entered in the cause on March 23, 2005, as modified herein, are adopted, reiterated and incorporated herein as the final order of the Court." Appellant filed a timely notice of appeal.

## **II. ISSUES PRESENTED**

On appeal, Sweeney alleges error in the trial court's award of attorneys' fees to Appellees based upon the following issues, which we have restated slightly for the purpose of clarity:

1. Whether the trial court erred in ruling that the action was pursued by Appellees on the behalf of the corporation, and specifically, whether Appellees complied with Miss. Code Ann. § 79-11-193 (2005) and otherwise made a proper demand to the GEC prior to bringing suit.
2. Whether the trial court erred by awarding Appellees attorneys' fees notwithstanding Appellees' failure to adhere to the procedures for bringing a derivative action as set forth in the SCV bylaws, which purportedly required Appellees to provide all members of the GEC with a copy of a complaint and obtain approval by the GEC prior to filing suit.

Appellees present the following issue for our consideration:

Whether they are entitled to attorneys' fees and costs as a result of this appeal.

For the following reasons, we affirm.

### III. DISCUSSION

We review the factual findings of the trial court *de novo* upon the record, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d). We review the trial court's conclusions of law *de novo*, with no presumption of correctness. ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993).

With regard to the requirements for actions brought on the behalf of Mississippi nonprofit corporations under the Mississippi Nonprofit Corporation Act, Mississippi Code Annotated § 79-11-193 (2005) provides:

§ 79-11-193. Proceedings brought on behalf of domestic or foreign corporation

(1) A proceeding may be brought in the right of a domestic or foreign corporation to procure a judgment in its favor by:

(a) Any member or members having five percent (5%) or more of the voting power or by fifty (50) members, whichever is less; or

(b) Any director.

(2) In any such proceeding, each complainant shall be a member or director at the time of bringing the proceeding.

(3) A complaint in a proceeding brought in the right of a corporation must be verified and allege with particularity the demand made, if any, to obtain action by the directors and either why the complainants could not obtain the action or why they did not make the demand. If a demand for action was made and the corporation's investigation of the demand is in progress when the proceeding is filed, the court may stay the suit until the investigation is completed.

(4) On termination of the proceeding the court may require the complainants to pay any defendant's reasonable expenses (including counsel fees) incurred in defending the suit if it finds that the proceeding was commenced frivolously or in bad faith.

(5) If the proceeding on behalf of the corporation results in the corporation taking some action requested by the complainants or otherwise was successful, in whole or in part, or if anything was received by the complainants as the result of a judgment, compromise or settlement of an action or claim, the court may award the complainants reasonable expenses (including counsel fees).

Because the Mississippi statutory provision regarding the court's ability to award attorneys' fees is permissive, rather than mandatory, we review the trial court's decision to award attorneys' fees pursuant to Miss. Code Ann. § 79-11-193(5) under the abuse of discretion standard. *See, e.g., Mueller v. Home Entm't & Appliance Rentals*, Shelby Law No. 67, 1985 Tenn. App. LEXIS 3219, at \*8 (Tenn. Ct. App. Oct. 24, 1985) (applying abuse of discretion standard of review to trial court's denial of attorneys' fees pursuant to Tenn. Code Ann. § 47-18-109(e)(1), which provided that "the court may award to the person bringing such action reasonable attorney's fees and costs").

Sweeney argues that attorneys' fees were erroneously awarded to Appellees under Miss. Code Ann. § 79-11-193. Appellant contends that the pleading requirement of Miss. Code Ann. § 79-11-193 was not satisfied by Appellees, because, in their first complaint, they failed to specify what demand had been made to the GEC prior to filing suit on February 17, 2005, or why no such demand had been offered. While Appellant recognizes that the trial court permitted Appellees to intervene and amend their original complaint to conform with these pleading requirements,<sup>3</sup> he argues that the policy fostered by the demand requirement set forth at Miss. Code Ann. § 79-11-193 prevents this Court from affirming the award of the court below. Additionally, Appellant argues that Appellees did not satisfy the SCV bylaws requirement that prior to bringing any suit on behalf of SCV, a written copy of the suit must first be distributed to all members of the GEC, and the GEC must approve the commencement of the action.

The parties do not dispute that Mississippi law controls the substantive issues of this case, since SCV is incorporated in Mississippi. This Court has held:

Tennessee has long adhered to the "internal affairs" doctrine, under which matters involving the internal affairs of a foreign corporation are deemed substantive in nature and "should be resolved in accordance with the law of the state of incorporation." *See Bayberry Assocs. v. Jones*, 1988 Tenn. App. LEXIS 718, No. 87-261-II, 1988 WL 137181, at \*4 (Tenn. Ct. App. Nov. 9, 1988), vacated on other grounds, 783 S.W.2d 553 (Tenn. 1990); *see Amberjack, Ltd. v. Thompson*, 1997 Tenn. App. LEXIS 679, No. 02A01-9512-CV-00281, 1997 WL 613676, at \*8-\*9 (Tenn. Ct. App. Oct. 7, 1997) (following the "internal affairs" doctrine as described in *Bayberry*). The General Assembly implicitly recognized the internal affairs doctrine in Tennessee Code Annotated §48-25-105(c), which provides that Tennessee's corporation statutes "do not authorize this state to regulate the organizational or internal affairs of a foreign corporation authorized to transact business in this

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<sup>3</sup>Appellant's representations at oral argument that Appellees' amended complaint was never filed with the court below are contradicted by our review of the technical record, which indicates that their motions to intervene and amend and their amended complaint were filed on October 20, 2005, with the Maury County Clerk and Master.



state.”

*Hicks v. Lewis*, 148 S.W.3d 80, 84-85 (Tenn. Ct. App. 2003). However, in matters involving procedural law, the law of the forum state applies, which in this case is Tennessee. See *In re Stalcup’s Estate*, 627 S.W.2d 364, 368 (Tenn. Ct. App. 1981); *Sherwin Williams Co. v. Morris*, 156 S.W.2d 350, 352 (Tenn. Ct. App. 1941).

***A. Demand Requirement under the Mississippi Nonprofit Corporation Act***

In this case, Appellees concede that their initial complaint, filed on February 17, 2005, contained no allegations of a demand made upon the GEC. The complaint sought a temporary restraining order, a temporary injunction to be made permanent after a hearing, and attorneys’ fees. The temporary restraining order was granted by the trial court, and subsequently extended until a hearing. Appellant then filed a motion to dismiss the complaint and motion to dissolve the temporary restraining order. A hearing was held as scheduled on March 9, and on March 23, the trial court entered an order in which it expressed its ruling as follows:

[I]t is hereby  
ORDERED, ADJUDGED, and DECREED that the Temporary Restraining Order filed on February 18, 2005 and extended by Order filed on February 25, 2005 is dissolved, Plaintiff’s Motion for Temporary Injunction is denied, Defendant’s Motion to Dissolve Temporary Restraining Order and to Dismiss is granted in part and denied in part, such motion being granted as to the motion to dissolve the temporary restraining order and denied as to the motion to dismiss.

After the trial court’s ruling by order on March 23, Appellees moved for attorneys’ fees pursuant to Miss. Code Ann. § 79-11-193(5) (2005). Sweeney argued in response that the parties were not properly before the court as derivative plaintiffs, because of their failure to “allege with particularity the demand made, if any, to obtain action by the directors and either why the complainants could not obtain the action or why they did not make the demand[,]” as required by Miss. Code Ann. § 79-11-193(3) (2005). In the September 23 order, the trial court stated that it would “entertain a motion to intervene and to file an amended complaint.”

Appellees thereafter filed a motion entitled “Motion to Intervene and to Amend Complaint” in which they stated:

1. The intervening Plaintiffs are Mark L. (Beau) Cantrell, Dr. Norman Dasinger, William E. Faggert, John L. French, Ralph Green, Robert L. Hawkins, III, C. Anthony Hodges, D.D.S., and Charles H. Smith. At the time suit was filed in this cause, all of the Intervening Plaintiffs were designated directors of the SCV GEC.

2. That they are so situated that the disposition of this case, including the Motion for an Award of Interim Attorney Fees and Expenses Incurred, may, as a practical matter, impair or impede their ability to protect their interests because their interests are not adequately represented by the existing parties and without the proposed intervention, a just adjudication of this case would be impossible.
3. That their intervention will not delay the disposition of this case and it will not raise any jurisdictional or venue questions.
4. In the event the Court permits intervention, the Complaint should be amended. A copy of the proposed Amended Complaint is attached hereto.

In their amended complaint, Appellees stated, “[t]he Intervening Plaintiffs did not make a formal demand for action to Defendants because of the futility of doing so.” The trial court subsequently granted the motions, and explained its rationale for allowing the amendment in the December 9, 2005 order:

1. It is appropriate to allow the formal intervention of the eight Intervening Plaintiffs, all of whom were, at the beginning of this litigation, directors of the General Executive Council . . . , which is the corporate board of directors of the Sons of Confederate Veterans, Inc. . . . The eight individuals are the real parties in interest that were acting for the benefit of the SCV at the time upon their belief that they had the authority on behalf of the SCV to incur legal expense on behalf of the corporate entity.

. . .

3. This derivative action for declaratory judgment relief resulted from the refusal of Defendant Sweeney and allied members of the GEC to appropriately respond to objections of the Intervening Plaintiffs to actions of Defendant Sweeney and allied members in a December 2004 meeting of the GEC. Action of Defendant Sweeney and the members of the GEC siding with him, equates to refusal by the GEC to take action requested by the Intervening Plaintiffs before and after the institution of the litigation making a derivative action on their part appropriate.

. . .

4. It was not until the March 9, 2005 decision of the Court that the Intervening Plaintiffs knew their authority to act for the SCV was not to be thereafter recognized by the Court. The nature of this litigation was then and has continued to be derivative in nature [sic] for the purpose of the Court declaring the validity of corporate governance

positions espoused or taken by contesting factions of the corporation executives and board.

6. The Court's decision of March 9, 2005, and resulting order of March 23, 2005, invalidating the meeting of February 16, 2005, had the effect of causing this action at that point, if not before, to be a derivative action under the applicable Mississippi and Tennessee statutes, so that the subsequent Motion to Amend is merely a vehicle to finally recognize what has been the case from the beginning. The March 9, 2005, hearing and the order entered as a result thereof effectively recognized that a derivative action had been and was effectively pursued at that time, thus it is appropriate to allow the Intervening Plaintiffs' Motion to Amend as they are indeed the real parties in interest in this case.

Since the motions to intervene and amend are matters of procedural law, Tennessee law applies. Rule 24.01 of the Tennessee Rules of Civil Procedure provides in pertinent part:

Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties . . . .

Tenn. R. Civ. P. 24.02 (2006). A person seeking to intervene must file a motion to intervene, which "shall state the grounds therefore and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." *In re Estate of Brown*, No. M2005-00864-COA-R3-CV, 2006 Tenn. App. LEXIS 694, at \*4 (Tenn. Ct. App. Oct. 27, 2006) (citing Tenn. R. Civ. P. 24.03). Where the motion to intervene is an intervention as of right, the standard by which this court reviews the trial court's decision is *de novo*, except for the timeliness of the application which is reviewed under an abuse of discretion standard. *Id.* (citing *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 191 (Tenn. 2000)). Applying this standard, we find no error or abuse of discretion by the trial court in its decision to grant Appellees' motion to intervene.

"Where a motion to amend pleadings comes after responsive pleadings have been filed, it is within the sound discretion of the trial court to grant or deny the motion. This court will not reverse the trial court's decision absent an abuse of discretion or a resulting injustice." *Fann v. City of Fairview*, 905 S.W.2d 167, 175 (Tenn. Ct. App. 1994) (citing *Wilson v. Ricciardi*, 778 S.W.2d 450, 453 (Tenn. Ct. App. 1989)). We similarly find no abuse of discretion by the trial court in allowing Appellees to file an amended complaint.

In *Longanecker v. Diamondhead Country Club*, 760 So. 2d 764 (Miss. 2000), the Mississippi Supreme Court discussed, at length, the parameters of a general demand requirement for derivative actions pursued on the behalf of Mississippi nonprofit corporations. One of the issues before the Court was the correctness of the trial court's conclusion that the appealing plaintiffs had failed to make a proper demand upon the defendant nonprofit corporation prior to filing their complaint. *Longanecker*, 760 So. 2d at 768-69. The Court noted that the case was properly governed by Miss. Code Ann. § 79-11-193, and it noted that there was at the time "a dearth of case law or statutory guidance concerning what is required in making a demand on a nonprofit corporation." *Id.* at 769. The Court therefore examined case law and statutes from Mississippi's sister jurisdictions, namely Tennessee and Georgia, and concluded that demand was indeed required prior to filing a derivative action on the behalf of a nonprofit corporation. *Id.* at 769-70 (citing *Burke v. Tenn. Walking Horse Breeders' & Exhibitors' Assoc.*, No. 01A01-9611-CH-00511, 1997 Tenn. App. LEXIS 378, 1997 WL 277999, at \*24 (Tenn. Ct. App. May 28, 1997) ("The foregoing rules for ordinary corporations apply with even greater effect in regard to not-for-profit corporations in which there are no stockholders holding a property interest to suffer loss as a result of corporate action."); Ga. Code Ann. § 14-3-742 (1991)). The Court stated:

Similarly, in this case, the Longaneckers made no demand to the Board of Directors as a whole. The chancellor in this case said, "this lawsuit was the only demand ever made. To find otherwise would require all such boards to see any letter or conversation as a demand." This is especially true in light of the stated goal of demand, which is to allow the corporation to take action to prevent divisive legal proceedings. In light of the purpose of demand, we hold that demand requires some meaningful opportunity for the directors to act after learning of a threat of suit on the issue.

*Id.* at 770. The Court went on to hold that the plaintiffs "lacked standing to sue derivatively for their failure to make demand" and therefore affirmed the trial court's judgment in favor of the defendant nonprofit corporation. In the decision of *Whalen v. Pleasant Hill Water Ass'n*, 891 So. 2d 250, 254 (Miss. Ct. App. 2004), the Mississippi Court of Appeals cited *Longanecker* for its definition of "demand" under the Mississippi Nonprofit Corporation Act:

A demand is required to allow the corporation to take action to prevent divisive legal proceedings. *Longanecker v. Diamondhead Country Club*, 760 So. 2d 764 (P13) (Miss. 2000). Given this purpose of making demand, some meaningful opportunity for the directors to act after learning of a threat of suit on the issue is necessary. *Id.* The Mississippi Nonprofit Corporation Act, Miss. Code Ann. Sections 79-11-101-403 (Rev. 2001), does not require any procedural formalities which must be followed when making a demand other than alleging

with particularity the demand made or why the demand could not be made. *Longanecker*, 760 So. 2d at 769 (P11).

When a trial court decides a case without a jury, its findings of fact are presumed to be correct unless the evidence in the record preponderates against them. *Sherrod v. Wix*, 849 S.W.2d 780, 783 (Tenn. Ct. App. 1992) (citing Tenn.R.App.P. 13(d)). The appellant has the burden to show that the evidence presented below preponderates against the trial court's judgment. *Mfrs. Consol. Serv. v. Rodell*, 42 S.W.3d 846, 865 (Tenn. Ct. App. 2000) (citing *Coakley v. Daniels*, 840 S.W.2d 367, 370 (Tenn. Ct. App. 1992)). This court cannot review the facts *de novo* without an appellate record containing the facts, and therefore, we must assume that the record, had it been preserved, would have contained sufficient evidence to support the trial court's factual findings. *Sherrod*, 849 S.W.2d at 783 (citing *McDonald v. Onoh*, 772 S.W.2d 913, 914 (Tenn. Ct. App. 1989); *Irvin v. City of Clarksville*, 767 S.W.2d 649, 653 (Tenn. Ct. App. 1987); *Gotten v. Gotten*, 748 S.W.2d 430, 432 (Tenn. Ct. App. 1988)). In the absence of a transcript or an adequate statement of the evidence, a presumption arises that the parties presented sufficient evidence to support the trial court's judgment, and this Court will affirm the judgment. *Mfrs. Consol. Serv.*, 42 S.W.3d at 865.

The Mississippi Supreme Court has clearly articulated its view that "demand requires some meaningful opportunity for the directors to act after learning of a threat of suit on the issue[.]" See *Longanecker*, 760 So. 2d at 769-70. Although Appellees acknowledged that they made no "formal" demand to the GEC, we do not believe that this statement precludes a finding that other means of demand upon the GEC were attempted by Appellees that would be sufficient under *Longanecker*. The record before us on appeal does not provide a factual account of what specific actions were taken by Appellees prior to their filing the complaint. Regarding this issue, the trial court in this case stated its findings as follows:

This derivative action for declaratory judgment relief resulted from the refusal of Defendant Sweeney and allied members of the GEC to appropriately respond to objections of the Intervening Plaintiffs to actions of Defendant Sweeney and allied members in a December 2004 meeting of the GEC. Action of Defendant Sweeney and the members of the GEC siding with him, equates to refusal by the GEC to take action requested by the Intervening Plaintiffs before and after the institution of the litigation making a derivative action on their part appropriate.<sup>4</sup>

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<sup>4</sup>Appellees contend that this finding by the trial court amounted to an endorsement of a recognized futility exception to the general demand requirement under Mississippi law with regard to actions brought on the behalf of nonprofit corporations. We disagree with this interpretation of the trial court's ruling on this issue.

We note that in the decision of *Speetjens v. Malaco, Inc.*, 929 So. 2d 303, 309-10 (Miss. 2006), the Mississippi Supreme Court held that there was not a futility exception to the written demand requirement set forth at Miss. Code Ann. § 79-4-7.42 of the Mississippi Business Corporation Act, which governs derivative suits brought on the behalf of corporations run for profit. We express no opinion as to the existence or nonexistence of a futility exception to demand under the Mississippi Nonprofit Corporation Act, as the issue appears yet to have been addressed by Mississippi courts.

Appellant's failure to include a transcript of evidence or statement of the evidence on appeal to this Court is significant, particularly because the trial court held multiple hearings, one of which, according to the court's March 23, 2005 order, lasted approximately seven hours. In the court's order, it stated that its ruling was based upon "approximately seven hours of oral argument" and that it had considered "the entire record in this action, including the exhibits admitted at the hearing." We must, accordingly, presume that evidence presented at these hearings supported the trial court's findings on this issue, and that whatever efforts exerted by Appellees to obtain certain actions or inactions by Sweeney and his allied GEC members satisfied the demand requirement for Mississippi nonprofit corporations as it is described in *Longanecker*. Therefore, insofar as Appellant challenges the trial court's award of attorneys' fees for failure to comply with Miss. Code Ann. § 79-11-193, or otherwise satisfy the demand requirement as defined in *Longanecker* and subsequent Mississippi decisions, we affirm the trial court's judgment on this issue. Additionally, we find no abuse of discretion by the trial court in its decision to award attorneys' fees under the Mississippi Nonprofit Corporation Act.

### ***B. SCV Bylaws Requirements for Derivative Actions***

Appellant's remaining issue involves Appellees' failure to comply with the procedures set forth in the SCV bylaws for bringing an action on behalf of SCV. Appellant argues that, because Appellees failed to provide the GEC with a copy of the complaint or obtain authority to engage in litigation on its behalf, Appellees lacked "standing" to pursue action "on the behalf of" SCV, and thus the award of attorneys' fees under Miss. Code Ann. § 79-11-193(5) (2005) was erroneous. It is undisputed that Appellees did not provide all members of the GEC with a copy of the complaint before the complaint was filed.<sup>5</sup>

The SCV bylaws appear several times in the technical record, and the section relied upon by Appellant provides:

#### *ARTICLE XVI - Prohibitions*

...

Section 7. No legal action against or on behalf of the Sons of Confederate Veterans, its officers and/or members shall be undertaken or entered into by any member of the Sons of Confederate Veterans in which that member proposes to act as a representative or agent of the Sons of Confederate Veterans without prior approval of the General Executive Council. If a proposed legal action is presented to the General Executive Council for approval, the petition

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Furthermore, in light of the absence of a transcript or statement of the evidence in this case, resolution of this issue is not necessary to our decision on appeal.

<sup>5</sup>Appellees allege that they were "at odds with a great many of the GEC including [Commander-in-Chief] Sweeney" and that "[a]s a result, publishing the Complaint to members of the GEC would have proven fruitless."

shall be distributed in writing to all members of the Council prior to the filing of the same. The petition shall state the name(s) and address(es) of the party (parties) against whom the petition is proposed to be filed. The affirmative vote of the members of the Council shall be necessary for Council approval of such legal action. If any legal action is filed without the approval of the Council, the member(s) filing such action shall be subject to expulsion from the Sons of Confederate Veterans in accordance with the provisions of this Constitution which relate to expulsion of members.

Sweeney filed a motion to dismiss Appellees' complaint on March 7, 2005, along with a memorandum of law, a copy of the SCV bylaws, his own affidavit and the affidavit of James Dark, in which they denied ever having been provided a copy of the complaint filed by Appellees on February 17. In his accompanying memorandum of law, Sweeney alleged that dismissal was proper because of Appellees' failure to comply with the SCV bylaws prior to bringing the action, because venue was improper, and because Appellees had not satisfied the requirements for obtaining a restraining order. Appellees filed a response in which they addressed arguments by Sweeney concerning venue and temporary restraining order requirements, but failed to acknowledge or address Sweeney's allegation that they had failed to comply with the cited portions of the SCV bylaws. In denying Sweeney's motion to dismiss on this basis in its order entered on March 23, 2005, the trial court briefly addressed Sweeney's bylaws argument:

The Court determines that defendant's motion to dismiss based upon lack of standing and lack of GEC approval of the action should be and hereby is denied based upon the premise that the Court should be open and accessible to prospective litigants and because of ambiguities in the language of the bylaw provisions that the defendant relies upon.

As a preliminary matter, we direct the parties' attention to Rule 6 of the Rules of the Tennessee Court of Appeals, which provides the following procedures for presentation of issues to this Court:

- (a) Written argument in regard to each issue on appeal shall contain:
  - (1) A statement by the appellant of the alleged erroneous action of the trial court which raises the issue and a statement by the appellee of any action of the trial court which is relied upon to correct the alleged error, *with citation to the record where the erroneous or corrective action is recorded.*
  - (2) A statement showing how such alleged error was seasonably called to the attention of the trial judge with citation to that part of the record where appellant's challenge of the alleged error is recorded.

(3) A statement reciting wherein appellant was prejudiced by such alleged error, with citations to the record showing where the resultant prejudice is recorded.

(4) *A statement of each determinative fact relied upon with citation to the record where evidence of each such fact may be found.*

(b) No complaint of or reliance upon action by the trial court will be considered on appeal unless the argument contains a specific reference to the page or pages of the record where such action is recorded. No assertion of fact will be considered on appeal unless the argument contains a reference to the page or pages of the record where evidence of such fact is recorded.

(emphasis added). Appellant exerts no effort in his brief on appeal, particularly regarding this issue, to provide this Court with specific locations of alleged erroneous action by the trial court on the bylaws issue. Neither party acknowledged the trial court's apparent ruling on this issue, in response to Appellant's motion to dismiss, by order on March 23, 2005. Appellant's argument seemingly relies upon language employed by Miss. Code Ann. § 79-11-193, which specifically provides for "[p]roceedings brought on behalf of" nonprofit corporations. Appellant contends generally that the action cannot be considered one brought "on behalf of" SCV, because Appellees did not satisfy the procedures ostensibly established in the bylaws by members of SCV. Appellant cites no other legal authority in support of this position, however. Therefore, Appellant cites no error nor even acknowledges the trial court's disposition of this issue by order on March 23, but again frames this issue in the statutory language of Miss. Code Ann. § 79-11-193.

In response, Appellees argue that their failure to distribute copies of the complaint or obtain full GEC approval prior to filing is excused because the pertinent bylaws are contrary to Mississippi law. Appellees contend that the cited portions of the bylaws "fly in the face of the Mississippi [Nonprofit] Corporations Act . . . [which] explicitly provides for derivative suits." Although the section is not relied upon by Appellees, the Mississippi Nonprofit Corporation Act provides: "(1) The incorporators or board of directors of a corporation shall adopt bylaws for the corporation. (2) The bylaws may contain any provision for regulating and managing the affairs of the corporation *that is not inconsistent with law or the articles of incorporation.*" Miss. Code Ann. § 79-11-145 (2005) (emphasis added).

We have already stated that the absence of a transcript in this appeal leads us to leave undisturbed the trial court's ruling that Appellees' actions at the December 2004 meeting of the GEC and their amended complaint satisfied the minimum requirements for bringing a derivative action under the Mississippi Nonprofit Corporation Act and *Longanecker*. We recognize that the trial court denied Appellant's motion to dismiss, which was in part founded upon the bylaws issue, after conducting a seven-hour hearing at which arguments were presented and exhibits were admitted. Because no transcript of this hearing has been provided for our review, the exact reasoning for this denial is not altogether clear, although the trial court relied on "the premise that the Court should be



open and accessible to prospective litigants” and its conclusion that “ambiguities in the language of the bylaw provisions that [Sweeney] relies upon.”

Because of the absence of a transcript or statement of evidence from the relevant hearing on this issue, it is unclear if the trial court considered the issue of whether the SCV bylaws were inconsistent with the Mississippi Nonprofit Corporation Act or the SCV articles of incorporation, as proscribed by Miss. Code Ann. § 79-11-145. However, we are not at liberty to presume, even in the absence of an express ruling thereon, that the trial court overlooked a viable issue in the case. **Brookside Mills v. William Carter Co.**, CA No. 03A01-9403-CH-00111, 1994 Tenn. App. LEXIS 674, at \*16-17 (Tenn. Ct. App. 1994). Furthermore, even if we were inclined to decide this issue on appeal, the present state of the record leaves us unable to do so. The SCV articles of incorporation do not appear in the record before this Court, and they would be necessary for a complete application of Miss. Code Ann. § 79-11-145 to the bylaws at issue.

The trial court apparently concluded that ambiguity in the language of the SCV bylaws precluded their application to the case at bar, specifically with regard to Appellees’ admitted failure to provide all members of the GEC with a copy of the complaint or to obtain approval by the full GEC prior to filing suit. We recognize that “[i]n the interpretation of by-laws the principles obtain which govern in the interpretation of statutes, contracts, and other private instruments.” 18 C.J.S. Corporations § 116 (1990). Therefore, it follows that a trial court’s interpretation of bylaws will be subject to *de novo* review. See **Union Planters Nat’l Bank v. American Home Assurance Co.**, 865 S.W.2d 907, 912 (Tenn.App.1993) (“The interpretation of a written agreement is a matter of law and not of fact, therefore, our review is *de novo* on the record with no presumption of the correctness of the trial court’s conclusions of law.”). However, even if Appellant cited error with the trial court’s conclusion that the SCV bylaws were ambiguous on this issue, which he has failed to do, this Court cannot conduct a *de novo* review without a complete appellate record containing the facts. **Young v. Mayhew**, No. W2002-00185-COA-R3-JV, 2002 Tenn. App. LEXIS 664, at \*5 (Tenn. Ct. App. Sept. 13, 2002) (citing **Sherrod v. Wix**, 849 S.W.2d 780, 783 (Tenn. Ct. App. 1992)). Therefore, Appellant’s failure to include a transcript or statement of the evidence once again constrains our review of the issues as they are presented on appeal.

Nonetheless, our application of Miss. Code Ann. § 79-11-145 to the SCV bylaws is not necessary to our disposition of this issue, nor is our interpretation of the bylaws in an attempt to determine the trial court’s basis for concluding that these bylaws were ambiguous. Even if Appellant alleged specific error in the trial court’s denial of his motion to dismiss on the bylaws issue, which he has not, we are unable to ascertain what legal authority he would rely upon to support this “standing” argument. Again, we recognize that the Mississippi Nonprofit Corporation Act provides:

§ 79-11-193. Proceedings brought on behalf of domestic or foreign corporation

(1) A proceeding may be brought in the right of a domestic or foreign corporation to procure a judgment in its favor by:

(a) Any member or members having five percent (5%) or more of the voting power or by fifty (50) members, whichever is less; or

(b) Any director.

(2) In any such proceeding, each complainant shall be a member or director at the time of bringing the proceeding.

(3) A complaint in a proceeding brought in the right of a corporation must be verified and allege with particularity the demand made, if any, to obtain action by the directors and either why the complainants could not obtain the action or why they did not make the demand. If a demand for action was made and the corporation's investigation of the demand is in progress when the proceeding is filed, the court may stay the suit until the investigation is completed.

Miss. Code Ann. § 79-11-193 (2005). As explained above, Mississippi courts have held that “[t]he Mississippi Nonprofit Corporation Act . . . does not require any procedural formalities which must be followed when making a demand other than alleging with particularity the demand made or why the demand could not be made.” See *Longanecker*, 760 So. 2d at 769; *Whalen*, 891 So. 2d at 254. Appellant does not appear to dispute that Appellees were each “directors” for the purposes of bringing a derivative action under Miss. Code Ann. § 79-11-193. Because of Appellant’s failure to provide this Court with authority in support of his position that Appellees otherwise lacked standing to bring an action on the behalf of SCV based upon the corporate bylaws, we perceive this argument to be again founded upon Appellees’ alleged failure to satisfy Miss. Code Ann. § 79-11-193 and *Longanecker*. As we have already addressed this issue and affirmed the trial court’s judgment based upon its finding that Appellees satisfied the statutory requirements and the demand requirement under *Longanecker*, we therefore find Appellant’s “standing” argument on the bylaws issue to be without merit. Appellees’ request for attorneys’ fees on appeal is denied.

#### IV. CONCLUSION

For the foregoing reasons, we affirm the trial court’s judgment awarding Appellees \$38,020.80 in attorneys’ fees. Costs are assessed against Appellant Denne A. Sweeney, and his surety, for which execution may issue if necessary.

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ALAN E. HIGHERS, JUDGE